Supreme Court, U.S.
FILED
AUG 21 1991
OFFICE OF THE CLERK

(3)

No. 90-1890

IN THE

Supreme Court of the United States

October Term, 1990

DONALD E. CLARK

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., and WENDELL C. HOOVER

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

Petitioner's Reply to Brief in Opposition

DAVID KENT HIGGINS
ROBINSON & MCELWEE
P.O. Box 1791
Charleston, WV 25326
(304) 344-5800
Counsel of Record for Petitioner

TABLE OF CONTENTS

Item	Page
Table of Contents	(i)
Table of Authorities	(ii)
Reply Brief	1
Summary of Reply	1
Reply Argument	2
Conclusion	5

TABLE OF AUTHORITIES

Cases	Page
Blue Gray Corps. I & II v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 921 F.2d 267 (11th Cir. 1991)	3,4
Brand v. *Piper Jaffray & Hopwood, Inc.*, 756 F.Supp. 405 (D. Minn. 1991)	2
Emery v. *Legg Mason Wood Walker, Inc.*, No. 90-2693 (4th Cir. June 3, 1991) (WESTLAW, CTA4 database)	2
McCausland v. *A. G. Edwards & Sons, Inc.*, 1991 Fed. Sec. L. Rep. (CCH) ¶ 95,899 (W.D. Pa. Mar. 7, 1991)	2
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)	4
Volt Info. Sciences v. *Stanford Univ.*, 489 U.S. 468 (1989)	4

REPLY BRIEF

Pursuant to Rule 15.6, Petitioner is permitted to file a reply brief addressed solely to arguments raised for the first time in the brief in opposition. Of the four legal arguments raised in the brief in opposition, two were not raised in the Petition for Writ of Certiorari.

Respondents argue that despite the existence of a "split" among the circuits, the issue presented is, in the language of the Respondents, "largely a past question." Respondents also argue that even if the decision by the Fourth Circuit in this case is incorrect, the specific language contained in the applicable brokerage agreements nonetheless requires arbitration of Petitioner's federal securities law claims. Neither of these arguments were addressed in the petition.

SUMMARY OF REPLY

When, as is the case here, an issue has been addressed by seven circuit courts and numerous district courts, such an issue has obvious nationwide impact and accordingly has significance far beyond the personal interest attached to the issue by the litigants in the case at bar. Furthermore, the question of whether contractual provisions that were inserted in response to regulation can be summarily disavowed upon subsequent change or repeal of the regulation is of clear importance in the area of administrative law generally and is of great interest to those affected by the regulatory actions of state and federal agencies.

The argument by Respondents, that even if the Fourth Circuit decision in this case is incorrect the language of the contract itself requires arbitration of federal securities law claims, is manifestly without merit. Merrill Lynch admits that the purpose of Rule 15c2-2 was to exclude federal securities law claims from arbitration agreements. Merrill Lynch also admits that it inserted the language at issue into Petitioner's agreements in response to the SEC rule. It is, therefore, futile for Merrill Lynch to now argue that the subject language does not exclude federal securities law claims from arbitration.

REPLY ARGUMENT

1. *The Issue Presented Merits Review by this Court.*

At page 12 of their brief in opposition, Respondents admit that there is a conflict among the circuits on precisely the issue presented in this case. With five circuits aligned against the Fourth Circuit, it is clear that the issue has sufficient merit to warrant review by this Court. The existence of a conflict among the circuits is well-recognized as sufficient grounds for review by this Court. Rule 10.1(a) of the Rules of this Court states that a conflict among the circuits is a situation where review by this Court will be considered.

Respondents argue, however, that eventually the litigation spawned by the adoption and rescission of Rule 15c2-2 will cease. As a practical matter, however, if this Court does not resolve the conflict among the circuits and refuses to grant Petitioner's writ in this case then more not less litigation will result in the future. Brokerage houses will advance the Fourth Circuit rule, and customers will continue to advance the rule established in the five other circuits.[1]

If this Court desires to hasten the eventual demise of Rule 15c2-2 litigation then it should summarily reverse the Fourth Circuit in this case so that there will be no conflict among the circuits. Reversal of the Fourth Circuit by this

---

1. In fact, the Fourth Circuit's decision in *Clark* has already become a factor in similar litigation involving what effect the repeal of SEC Rule 15c2-2 should have on contracts with "exclusionary language." The Fourth Circuit, in the unpublished disposition of *Emery* v. *Legg Mason Wood Walker, Inc.*, No. 90-2693 (4th Cir. June 3, 1991) (WESTLAW, CTA4 database), directly cited as authority its holding in *Clark* while interpreting the exclusionary language involved as mere notice and reversing the district court's refusal to compel arbitration of the customer's federal securities law claims.

The federal district courts in *McCausland* v. *A.G. Edwards & Sons, Inc.*, 1991 Fed. Sec. L. Rep. (CCH) ¶95,899 (W.D. Pa. Mar. 7, 1991) and *Brand* v. *Piper Jaffray & Hopwood, Inc.*, 756 F.Supp. 405 (D. Minn. 1991) cited *Clark* as contrary authority to their decisions which, on the basis of the exclusionary language at issue, denied the brokers' motions to compel arbitration of the federal securities law claims.

Court will indeed make the application of Rule 15c2-2 a "thing of the past." Failure to correct the Fourth Circuit decision will only generate further litigation on the issue.

This case also presents an opportunity to examine an important issue of administrative law: is a regulated entity bound by provisions of a contract which the entity itself inserted in response to a regulatory directive once the directive is rescinded? Five circuits have held that the regulated entity cannot disavow such provisions. The Fourth Circuit decision in this case, if permitted to stand, will invite the argument that certain contractual obligations can be avoided whenever regulations change in the future. The uncertainty created by the ability to disavow contractual provisions should be avoided where possible.

2. *The Applicable Language in This Case Clearly Excludes Federal Securities Law Claims from Arbitration.*

Merrill Lynch argues that the "exclusionary language" which it used in its agreements with Petitioner does not exclude federal securities law claims from arbitration. As shown in a footnote on page 12 of the brief in opposition, Merrill Lynch has already lost this argument before the Eleventh Circuit.

In *Blue Gray Corps. I & II* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 921 F.2d 267 (11th Cir. 1991), virtually identical language to that contained in three of the four applicable agreements in this case was before the court. As here, Merrill Lynch argued that its own language was ambiguous and, given the presumption in favor of arbitration, the language should be construed as requiring arbitration of federal securities law claims. The Eleventh Circuit disagreed:

> The arbitration clause in this case did more than merely notify the plaintiff of the existing state of the law; it expressed the agreement between the parties . . . The parties agreed to arbitrate controversies "[e]xcept to the extent that controversies involving claims arising under Federal securities laws may be litigated." The

> district court found the plain meaning of the clause to provide plaintiff with the option to bring federal securities claims in court. Defendant would have us, in essence, read the word "may" to mean "must." We find no reason to change the plain meaning of the language. Defendant presumably was capable of drafting this agreement in a way so that plaintiff's federal securities claims would now be arbitrable under current law. [fn 4] Even in light of the presumption in favor of arbitration, and the strong temptation to rewrite the arbitration agreement to achieve that result, we recognize that the presumption does not require parties to arbitrate when they have not agreed to do so.
>
> * * *
>
> 4/E.g., "Except to the extent that controversies involving claims arising under Federal securities laws are not arbitrable under applicable securities laws . . ."

Blue Gray Corps. I & II, 921 F.2d at 271.

Merrill Lynch would also have this Court misapply the presumption in favor of arbitration. The point here is that the language at issue *excluded* federal securities law claims from the scope of the agreement between the parties to arbitrate. "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). More recently, this Court has held that ". . . we have recognized that the FAA [Federal Arbitration Act] does not require parties to arbitrate when they have not agreed to do so . . . (the Act "does not mandate the arbitration of all claims"), nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement . . ." *Volt Info. Sciences* v. *Stanford Univ.*, 489 U.S. 468, 478 (1989).

Since the purpose of Rule 15c2-2 was to exclude claims under the 1934 Act as well as claims under the 1933 Act from arbitration, it ill behooves Merrill Lynch at this late date to argue that even though the subject language was inserted by

Merrill Lynch in response to the SEC rule, the language did not accomplish the purpose of the rule.

Finally, Merrill Lynch conveniently ignores the language contained in one of the four applicable agreements. Specifically, the Managed Options Agreement signed by the parties on June 24, 1985 reads as follows:

> Although you have signed a customer agreement form with MERRILL LYNCH that states you are required to arbitrate any future dispute or controversy that may arise between us, you are not required to arbitrate any dispute or controversy that arises under the federal securities laws but instead can resolve any dispute or controversy through litigation in the courts.

In order to avoid this clear statement and evidence of the intent of the parties not to include federal securities law claims within the agreement to arbitrate, Merrill Lynch makes a tortured argument based in part on reasoning contained in the district court opinion ordering litigation of securities claims. Admittedly, that order was not contested by Petitioner. Presumably, Merrill Lynch would have Petitioner contest and appeal a district court ruling in its favor. Throughout this litigation, Petitioner has consistently maintained that he was entitled to litigate his federal securities law claims with Merrill Lynch. The argument by Respondents concerning construction of the litigation language is misplaced and without merit.

CONCLUSION

Respondents admit in their brief in opposition that a conflict exists among the circuits on the issue presented in this case. Under the authority of five circuits, Mr. Clark would be permitted to litigate his federal securities law claims. The Fourth Circuit has denied Mr. Clark this right. In so doing the Fourth Circuit has without good reason placed itself in direct conflict with the other circuits.

Petitioner respectfully requests summary reversal of the Fourth Circuit decision based upon the petition, the brief in opposition and this reply brief. By making the law of the land uniform on this issue, future litigation concerning Rule 15c2-2 will subside.

Respectfully submitted,

DAVID KENT HIGGINS

Counsel of Record for Petitioner

E. GLENN ROBINSON
ROBINSON & MCELWEE
P.O. Box 1791
Charleston, West Virginia 25326
(304) 344-5800